PULASKI CIRCUIT COURT

Regular October Term
9th day of the Term
October 21, 1970

Commonwealth of Kentucky, - - - *Plaintiff,*

v.

Harry Roaden, - - - - - - - *Defendant.*

VERDICT # 4432 Showing Obscene Motion Picture

Court met pursuant to adjournment, at the hour of 9:00 A. M. Clerk polled the jury and each juror answered present. Thereupon the defendant announced closed and the court instructed the jury, who after hearing argument of counsel, the jury retired to their jury room to deliberate, and after due deliberation returned into open court the following verdicts:

> "This jury finds the motion picture Cindy and Donna obscene. Foreman Paul Elliott. We the jury finds the defendant Harry Roaden guilty as charged set his punishment $1000 fine and six months in jail. /s/ Paul Elliott, Foreman."

It is therefore ordered and adjudged that the Commonwealth of Kentucky recover of the defendant Harry Roaden the sum of $1000.00 and costs together with interest at the rate of 6% per annum from date until paid and that he further be confined in the County Jail for a period of 6 months. If the defendant fails to pay or replevy said fine and costs at the expiration of his jail sentence it is

ordered that he further be confined for a period of 1 day for each $2.00 of his unpaid fine and costs.

The court further ordered that the bond as to Harry Roaden be increased to $1500.00.

Thereupon came counsel for the Commonwealth and moved the Court to enter an order confiscating the 5 reels of film introduced in evidence as the Motion Picture "Cindy and Donna", it being indicated to the court by counsel for defendants that an appeal would be prosecuted, the court took the said motion under advisement.

/s/ Lawrence S. Hail, Judge
Pulaski Circuit Court

Opinion of the Court of Appeals of Kentucky
RENDERED: June 25, 1971,
Opinion as modified on denial
of Rehearing, December 17, 1971

COURT OF APPEALS OF KENTUCKY

Appeal from the Pulaski Circuit Court
Honorable Lawrence S. Hail, Judge

HARRY ROADEN, - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

OPINION OF THE COURT BY COMMISSIONER DAVIS—AFFIRMING

Harry Roaden, manager of Highway-27 Drive-In Theatre, was convicted of exhibiting obscene material in contravention of KRS 436.101(2). His penalty was fixed by the jury at a fine of $1,000 and confinement in jail for six months. The obscene material was a motion picture entitled "Cindy and Donna." It was conceded by Roaden's counsel in closing argument to the jury that the film is obscene. No issue is presented on appeal as to the obscenity of the material.

The assignments of error are that (1) the film was illegally seized; hence, evidence of its content should have been suppressed; (2) the court erred in permitting a deputy sheriff to have partial custody of the jury when the film was viewed, since the deputy was an interested witness for the prosecution; (3) the trial judge improperly questioned a witness; and (4) the prosecution should have been dismissed, or the judgment should be set aside because of failure of allegation or proof of scienter.

The sheriff of Pulaski County bought a ticket to the theatre and viewed the public showing of "Cindy and Donna." On the premise that the material was obscene, the sheriff proceeded to the projection booth and arrested Roaden, the manager of the theatre. He seized the reels of film incident to the arrest. The appellant contends that the seizure of the film and its subsequent use as evidence violated his constitutional immunity from illegal search and seizure. The appellant's theory is that a prior adversary hearing on the issue of obscenity of the material was required before the film could be seized. In support of that view the appellant relies on such decisions as Marcus v. Search Warrants, 367 U. S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708, and A Quantity of Copies of Books v. Kansas, 378 U. S. 205, 12 L. Ed. 2d 809, 84 S. Ct. 1723. Those decisions relate to seizure of allegedly obscene material for destruction or suppression, not to seizures incident to an arrest for possessing, selling, or exhibiting a specific item. This court dealt with a related question in Smith v. Commonwealth, Ky., 465 S. W. 2d 918, and held that a prior adversary hearing respecting obscenity was not required where the allegedly obscene material was purchased in the usual course of business.

The specific question was treated by a three-judge federal court in Hosey v. City of Jackson, Mississippi (SD Miss), 309 F. Supp. 527 (1970).[1] There police officers had viewed the film "Candy" at a public showing, after which they arrested the manager and projectionist of the movie house and seized the film incident to the arrest. In rejecting the same argument which appellant presents, the court said, in part:

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[1]The Supreme Court has vacated the judgment in Hosey v. City of Jackson, Mississippi, in light of the Court's policy of noninterference in state prosecutions, but not on the merits. See 401 U. S. 987, 28 L. Ed. 2d 525, 91 S. Ct. 1221 (1971).

> "This court is of the opinion that the seizure of an allegedly obscene film as an incident to lawful arrests for a crime committed in the presence of the arresting officers, i.e., the public showing of such film does not exceed constitutional bounds in the absence of a prior judicial hearing on the question of its obscenity." Id. 309 F. Supp. at page 533.

The court elaborated its reasons, noting that the arrest must be legal, the arresting officer must view the film in its entirety and apply the legal guidelines for measuring obscenity, and may seize only the print of the film viewed. In Perez v. Ledesma, 401 U. S. 82, 27 L. Ed. 2d 701, 91 S. Ct. 674 (Decided February 23, 1971), the Supreme Court reversed a decision of a three-judge federal court which had held illegal the seizure of material as obscene incident to an arrest without a prior adversary hearing as to its obscenity. The decision was premised upon the court's policy of noninterference with state criminal proceedings prior to adjudication by the state courts. This court is persuaded that the rule followed by the court in Hosey v. City of Jackson, Mississippi, *supra,* is the appropriate law. Lee Art Theatre v. Virginia, 392 U. S. 636, 20 L. Ed. 2d 1313, 88 S. Ct. 2103, upon which appellant relies, is not dispositive here. In Lee Art the film had been seized pursuant to a search warrant, not incident to an arrest. The basis for the holding in Lee Art was that there was no valid ground for issuing the search warrant; hence, the ensuing search and seizure were illegal. The reasoning of that decision is not applicable here.

Appellant next complains of the trial judge's ruling in permitting Deputy Sheriff Strunk to be placed in partial charge of the jury as it proceeded to and from a theatre to view the film. The court placed State Trooper King in joint charge of the jury. Deputy Sheriff Strunk had been directed by the sheriff to "keep an eye" on the theatre

managed by appellant and had viewed part of the film and testified in the case. In these circumstances it would have been more appropriate if the trial judge had sustained appellant's objection to allowing Deputy Strunk to accompany the jury. However, in light of the fact that Trooper King was also deputed for the task, when considered with the fact that there was no intimation of any impropriety committed by Deputy Strunk, the court considers the irregularity as harmless. In light of the importance of maintaining the entire judicial process above suspicion, care should be taken to preclude such possible errors in trials. Cf. Dalby v. Cook, Ky., 434 S. W. 2d 35, and Shackelford v. Commonwealth, 185 Ky. 51, 214 S. W. 788. The incident complained of does not rise to the magnitude of a prejudicial error; hence, it is not ground for reversal. RCr 9.24.

Just after the jury returned to the courtroom after viewing the film, Sheriff Gilmore Phelps was recalled as a prosecution witness. The Commonwealth's Attorney interrogated the sheriff merely to show that the film he had just viewed was recognized by him as the same picture he had seen exhibited publicly. No cross-examination was made, whereupon the following occurred:

"The Court: Let the record show that on the court's own motion the following questions were asked the Sheriff.

Q. 1. Sheriff Phelps you took the films from this courtroom did you not, to the theatre?

A. Yes, sir.

Q. 2. Were they in your custody at all times, from the time you left the theatre until you returned here with them?

A. Yes, sir.

Q. 3. And you have them here with you now?

A. Yes, sir.

Q. 4. And they were in your custody at all times

from the time you left the courtroom going to the Virginia Theatre to have them shown to the jury until you brought them back?

A. Yes, sir.

Q. 5. O.K., that's all."

It is urged by the appellant that the trial judge's intrusion into the case was prejudicial because it had the effect of creating the impression that the trial judge was aiding the prosecution by bringing out something which the Commonwealth's attorney had overlooked. It is also argued that the effect of the trial judge's participation was to create the impression that Sheriff Phelps was meticulous in every detail, thus bolstering him as a faithful servant of the law, eminently worthy of belief by the jury. The difficulty with the argument arises when it is recalled that no question was raised as to the obscenity of the film. Neither was there any issue as to the sheriff's having made the arrest as he had testified. The court is not persuaded that any adverse effect to appellant's rights flowed from the trial judge's actions. The trial judge's questions were competent and pertained to an orderly disposition of the proceedings. No error occurred. Kelly v. Commonwealth, Ky., 260 S. W. 2d 953.

Finally, it is urged that there was a fatal omission in the fact that the indictment did not charge scienter, nor did the proof show that appellant had knowledge of the film's content.

The indictment alleged in part that the defendant "did unlawfully and wilfully publish and exhibit, * * * an obscene motion picture entitled 'Cindy and Donna'." The indictment noted KRS 436.101 as its statutory basis. The statute itself requires that the element of scienter be shown. The instructions also required a finding of scienter as a predicate for conviction. The indictment, as drawn, was sufficient to furnish adequate notice of the offense charged.

It met the requirements of RCr 6.10. The trial court properly permitted the Commonwealth to amend the indictment to include scienter, as prescribed by RCr 6.16, since no additional offense was charged and no substantial right of the accused was prejudiced. Brown v. Commonwealth, Ky., 378 S. W. 2d 608; Fitzgerald v. Commonwealth, Ky., 403 S. W. 2d 21.

The appellant testified that he had never personally viewed the film in question. It was shown that the picture was exhibited at the theatre the night before the arrest was made. Appellant was the manager and present when the picture was shown. He said his duties required him to be at various places, so that he did not see the picture show. The jury was not required to believe appellant's testimony. The circumstances warranted a jury's belief that appellant did know the content of the film. It has been held that circumstantial evidence is an appropriate method for proving the purveyor's knowledge of the content of material alleged to be obscene. Smith v. People of the State of California, 361 U. S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215; State v. Andrews, Conn., 186 A. 2d 546.

The appellant seems to suggest that the Commonwealth was required to prove that appellant was aware that the film was obscene according to statutory and case-law standards. No basis for such a requirement is cited, nor does any suggest itself, particularly in light of appellant's concession that the film is obscene.

The judgment is affirmed.

All concur.

Mandate of the Court of Appeals of Kentucky
(Judgment)

THE COMMONWEALTH OF KENTUCKY

The Court of Appeals
Spring Term—June 25, 1971

HARRY ROADEN,

v.

COMMONWEALTH OF KENTUCKY.

Appeal from a judgment of the Pulaski Circuit Court.

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment is affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

DICK VERMILLION, C.C.A.
By /s/ John C. Scott, D. C.

Issued December 17, 1971.

Appended to the Mandate of the Court of Appeals of Kentucky is a card containing the following notation:

"DEC. 17, 1971
PETITION FOR REHEARING OVERRULED."

Excerpts From Transcript of Proceedings at Petitioner's Trial, Pulaski Circuit Court, October 20 and 21, 1971

TESTIMONY OF SHERIFF GILMORE PHELPS

Direct Examination by Mr. Harold D. Rogers:
(T. 27)

Q. 65. You may retake the stand, Sheriff, at the time you viewed the motion picture as you have earlier testified on September 29, 1970, did you make a determination as to whether or not the motion picture appealed to the prurient interest?

A. Yes, sir.

Cross Examination by Mr. Phillip K. Wicker:
(T. 31, 32)

Q. 7. Did you have any warrant when you made this arrest and seized this film?

A. No, sir.

Q. 8. Now, I believe you stated that following the showing of the film, you went to the projectionist booth and proceeded to arrest Mr. Roaden and seize the film, is that correct?

A. Yes, sir.

* * * * * * *

Q. 11. Mr. Phelps, had there been any prior determination before a magistrate or a Judge that this film was obscene?

A. Not to my knowledge.

PULASKI CIRCUIT COURT

Petitioner's Motion to Suppress Evidence
and Dismiss Indictment
(R 6, 7, 8)
Regular October Term
1st day of the term
October 12, 1970

COMMONWEALTH OF KENTUCKY, - - - *Plaintiff,*

v.

HARRY ROADEN, - - - - - - - *Defendant.*

MOTION TO SUPPRESS EVIDENCE AND DISMISS INDICTMENT # 4432

This day came counsel for defendant and produced and filed Motion to suppress evidence and dismiss indictment herein, which is now noted of record.

/s/ Lawrence S. Hail, Judge
Pulaski Circuit Court.

The Motion to Suppress Evidence and Dismiss Indictment as referred to in the last Order is in words and figures as follows, to-wit:

PULASKI CIRCUIT COURT

Commonwealth of Kentucky - - - Plaintiff

v.

Harry Roaden - - - - - - - Defendant

MOTION TO SUPPRESS EVIDENCE AND DISMISS INDICTMENT # 4432

Comes now the defendant by counsel, and moves the Court to suppress the evidence and dismiss indictment No. 4432 returned thereon on the following grounds:

1. That the evidence was improperly, unlawfully and illegally seized, contrary to the procedure provided by Statute and the laws of the land.

2. That without the improperly, unlawfully and illegally seized evidence an indictment would not be returnable, and therefore, should be dismissed.

HARRIS & WICKER
120 North Main Street
Somerset, Kentucky
Attorneys for Defendant

BY: /s/ Phillip K. Wicker
Phillip K. Wicker

NOTICE

TO: Hon. Harold Rogers
Commonwealth's Attorney
28th Judicial District
Somerset, Kentucky

Please take notice that the foregoing Motion to Suppress Evidence and Dismiss Indictment will be brought on for hearing before Hon. Lawrence S. Hail, Judge of the Pulaski Circuit Court, in the Court Room at Somerset, Kentucky, on Friday, October 16, 1970, at 2:00 p.m. or as soon thereafter as the business of the Court will permit. This 12th day of October, 1970.

/s/ Phillip K. Wicker
Counsel for Defendant

CERTIFICATE

I hereby certify that a copy of the foregoing Motion to Suppress Evidence and Dismiss Indictment, together with Notice of Motion, was personally handed to Hon. Harold Rogers, Commonwealth's Attorney, Somerset, Kentucky, on this 12th day of October, 1970.

/s/ Phillip K. Wicker
Counsel for Defendant

Excerpts from Transcript of Proceedings at Petitioner's Trial, Pulaski Circuit Court, Showing Rulings of Trial Court on Motion to Suppress the Evidence

In Chambers (T. 4):

Honorable P. K. Wicker: One thing I can anticipate by watching the trial the outcome of the ruling on the motion to suppress.

The Court: Let it be overruled, unless you want to have something to say.

Honorable Phillip K. Wicker: I don't know of anything else to add, certainly we can't add anything we didn't bring up Friday.

Honorable M. D. Harris: To what we did say. * * *

The Court: Overruled.

TESTIMONY OF SHERIFF GILMORE PHELPS

Direct Examination by Mr. Harold D. Rogers:

(T. 26, 27)

Q. 54. Now you have opened the larger of the two containers and there appears to be three reels of film inside, can you identify those reels?

A. Yes, sir.

Q. 55. What are they?

A. The film of Cindy and Donna.

Q. 56. Is that the same thing that you got that night?

A. Yes, sir.

Q. 57. I believe you have earlier testified that these are in the same condition as the night when you took them, is that correct?

A. Yes, sir.

Q. 58. Will you introduce the three reels?

Honorable P. K. Wicker: Objection, Your Honor, on the same grounds previously stated, we renew our motion to

suppress the films themselves, the Court being advised overruled said objection.

* * * * * * * *

Q. 60. Now, will you proceed to the small canister and tell us what if anything is in it?

A. There's two reels, Cindy and Donna and here is my mark I put on it the night I seized them.

Q. 61. Now, will you open that canister, what's in the canister now, Sheriff?

A. Two reels marked 4 and 5 containing the film Cindy and Donna.

Q. 62. Are those reels in the same condition as they were at the time you took them?

A. Yes, sir.

Q. 63. And is the film on both canisters the same?

A. Yes, sir.

Q. 64. Will you introduce the two reels in the small canister as Exhibits 4 and 5 to your testimony and the canister as Exhibit "B" to your testimony?

A. Yes, sir.

Honorable P. K. Wicker: Objection on the grounds as stated before—

The Court: Overruled.

(T. 43)

Q. 2. Sheriff have you just been with the Court and Jury to the Virginia Theatre at a time when a motion picture Cindy and Donna was just shown?

A. Yes, sir.

Q. 3. Did you recognize the motion picture?

A. Yes, sir.

Q. 4. Is it the same movie you earlier testified you saw on the evening of September 29th, 1970 at the Highway 27 Drive-In Theatre on South Highway 27?

A. The same one.

"Statement of the Questions Presented"
Excerpted from Petitioner's Brief Before the Court of Appeals of Kentucky

1. Was the appellant brazenly denied constitutional due process of law when the film was illegally seized by the Sheriff without any prior adversary hearing, and did the circuit court flagrantly commit reversible error in refusing to suppress the illegally seized film as evidence?

4. Did the circuit court commit reversible errors in overruling appellant's motions for a directed verdict, and for dismissal of the indictment, when the Commonwealth had neither alleged nor proved the essential element of scienter?

"Statement of the Questions Presented"
Excerpted from Petitioner's Petition for Rehearing Before the Court of Appeals of Kentucky

1. Was an adversary hearing constitutionally required prior to seizure of the film by the Sheriff so that it was reversible error for the circuit court to refuse to suppress the film as evidence, and did the Court, in holding to the contrary, overlook material facts in the record, overlook controlling decisions, and misconceive the law applicable to this issue?

4. Was the Commonwealth required to prove the elements of Redrup v. New York, and did this Court, in holding to the contrary, overlook material facts in the record, overlook controlling decisions, and misconceive the law applicable to this issue?

PROOF OF SERVICE

I, Phillip K. Wicker, attorney for the Petitioner herein, and a member of the Bar of this Court, hereby certify that on this 4th day of March, 1972, theree copies of the Petition

for Writ of Certiorari were mailed first class, postage prepaid, to Ed. W. Hancock, Esq., Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky, 40601, Counsel for the Respondent. I further certify that all parties required to be served have been served.

(s) Phillip K. Wicker
120 North Main Street
Somerset, Kentucky 42501
Attorney for Petitioner